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IN THE
COURT OF APPEALS OF INDIANA

JOHN STEWART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0609-CR-520
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No. 18C01-0404-FA-5

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

John Stewart appeals his convictions for Child Molesting, Sexual Misconduct with a Minor, and three counts of Child Molestation following a jury trial. He presents five issues for our review, which we consolidate and restate as:

1. Whether the trial court improperly denied Stewart's request to recall a State's witness during his case-in-chief.

2. Whether the State's evidence sufficiently established the essential elements of sexual misconduct with a minor.

3. Whether the trial court improperly sentenced Stewart to presumptive and consecutive sentences.

4. Whether Stewart's sentence is inappropriate in light of the nature of his offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

John Stewart was married to Patricia Kay Stewart, and they lived at the Hickory Haven Mobile Home Park. Patricia's granddaughter, H.V., and her step-granddaughter, K.H., often spent the night at Patricia's trailer. When H.V. was around eight years old, Stewart began touching her breasts and vagina while she was in Patricia's trailer. On one occasion, H.V. woke in the morning at Patricia's trailer and found that her pants were pulled down to her knees and were wet. On multiple occasions, Stewart touched H.V.'s breasts both over and under her clothes, in three different rooms in Patricia's trailer. He used both his hand and his tongue to touch H.V.'s vagina.

Stewart first touched K.H. sexually on her twelfth birthday when she was in the back bedroom in Patricia's trailer. He touched her on top of her clothes and directly on

her skin, and he touched her "boobs and [] vaginal area." Transcript at 290. When K.H. turned thirteen, Stewart licked her vaginal area, and he licked her vaginal area on numerous other occasions in Patricia's trailer. One time, H.V. and K.H. were spending the night at Patricia's trailer and sleeping in the same room. Stewart entered the room and touched both girls. Although H.V. and K.H. told each other that Stewart was touching them, they did not tell any adults until 2004.

When K.D. was nine years old, she spent the night at Patricia's trailer with H.V., who was her best friend, and the girls slept on the living room floor. Stewart came into the living room, pulled down K.D.'s underpants, and touched her vagina with his fingers. K.D. peeked and saw that it was Stewart, and then she pretended to be asleep. In the morning, K.D. woke H.V. and told H.V. that Stewart had touched her, and the girls decided not to tell anyone except K.H.

On April 5, 2004, H.V. and K.D. told their parents that Stewart was touching them. Family members told Patricia, who subsequently confronted Stewart. Stewart responded to Patricia, "they started it." Transcript at 357. When Stewart talked to the girls' parents, he said "they came on to me." Transcript at 282.

On April 23, 2004, the State charged Stewart with child molestation as a Class A felony, sexual misconduct with a minor as a Class B felony, and three counts of child molestation each as a Class C felony.[1] The trial court began Stewart's jury trial on June 26, 2006. After the State presented its case-in-chief, Stewart requested permission to

[1] Counts I-III relate to Stewart's conduct against K.H., while Count IV relates to his conduct against H.V., and Count V relates to his conduct against K.D.

recall H.V. during his case-in-chief. The trial court denied that request stating, in pertinent part, as follows:

> I don't believe that it would be proper to call her solely for the purpose of setting her up for impeachment when she was available during the State's case in chief and she was subject to cross examination, rather extensive cross examination, I might add. So, I don't – I think the Defendant has waived any right to have her recalled simply to set her up for an impeachment.

Transcript at 411. Stewart made an offer to prove testimony from Stewart's son that would have impeached H.V. if she had denied making certain statements. The jury convicted Stewart as charged.

On September 1, 2006, the trial court held Stewart's sentencing hearing. After evidence and argument, the trial court found as an aggravator that Stewart violated his position of trust with all three victims. The trial court also found three mitigating circumstances: 1) no criminal history; 2) an active support group; and 3) long-term incarceration would cause a hardship on Stewart's son, wife, and mother. The trial court found that the aggravating and mitigating circumstances balanced and imposed the presumptive[2] sentence for all five convictions. Transcript at 552-53

The trial court then found that the sentences should be served consecutively based, in part, on the fact that the crimes were "part of a pattern and series of molestations," transcript at 554, because they were committed at different times, against three different victims, and over a lengthy time period. The trial court also found that consecutive

[2] Because Stewart committed his crimes before the amendments of April 2005, the trial court apparently misspoke and said "advisory" when it should have said "presumptive." The trial court's error appears to be inadvertent and understandable, given the recent substantial revision of Indiana's sentencing scheme. Regardless, neither party raises the misuse of the word "advisory" as an issue. We will describe Stewart's sentences as "presumptive" and analyze them accordingly.

sentences were warranted because Stewart committed some of the crimes in the presence of minors and that he used his wife's family to gain access to the victims. The trial court imposed an aggregate sentence of fifty-two years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Motion to Recall Witness

Stewart contends that the trial court abused its discretion when it denied his request to recall H.V. during his case. Stewart explained that he intended to ask H.V. if she had ever threatened to put Stewart in jail, and if H.V. denied making such a statement, Stewart would impeach her with his son's testimony. Stewart argues that he could not have asked this question during his cross examination because it was beyond the scope of the State's direct examination. In his offer to prove, Stewart stated that his son, D.S., would testify that he overheard H.V. threaten to send Stewart to jail after he disciplined her. The trial court ruled that Stewart could not call a witness solely for the purpose of impeachment after noting that Stewart had conducted extensive cross examination of H.V.

The admission or exclusion of evidence is generally a determination within the trial court's discretion, and such ruling will only be reversed if it is "clearly erroneous and against the logic and effect of the facts and circumstances before the court." Ketchem v. State, 858 N.E.2d 255, 255 (Ind. Ct. App. 2006) (citing Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003)). Indiana Rule of Evidence 611 authorizes the trial court to exert "control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the

ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Section (b) of that same rule allows the trial court to permit a counsel's inquiry during cross examination into "matters affecting the credibility of the witness" and additional matters "as if on direct examination." Ind. Evidence Rule 611(b).

Stewart had the opportunity to question H.V. about her alleged threat against Stewart. Without objection from the State, Stewart specifically questioned H.V. about whether she knew D.S. and whether they were around Stewart at the same time. Clearly, H.V.'s motive to accuse Stewart is a matter affecting her credibility and appropriate for cross examination. Thus, we reject his argument that this question was beyond the scope of the State's direct examination. Even if Stewart had attempted to ask this question during cross examination and the trial court had sustained an "out of scope" objection, Stewart could have requested permission under Evidence Rule 611(b) to ask H.V. the question "as if on direct examination." It has long been the rule in Indiana that a party may not call a witness for the sole purpose of impeachment. J.J. v. State, 858 N.E.2d 244, 253 (Ind. Ct. App. 2006) (citing Appleton v. State, 740 N.E.2d 122, 125 (Ind. 2001)). Although Stewart denies that his sole purpose in calling H.V. was to impeach her, he bases that denial on the fact that he did not know if she would admit or deny making the statements. He does, however, admit that if H.V. had denied the statement, he would have impeached her with D.S.'s testimony. The trial court properly exercised its discretion by denying Stewart's motion to recall H.V.

We also reject Stewart's contention that the trial court's ruling denied him the opportunity to mount a meaningful defense. Stewart had the opportunity to present this question to H.V. More importantly, he testified on his own behalf and denied all the allegations against him. He also presented D.K.'s testimony that he had observed Stewart with H.V. and K.D. The trial court's ruling was not clearly erroroneous and did not impede Stewart's ability to defend himself.

Issue Two: Sufficiency of the Evidence

Stewart also argues that the State presented insufficient evidence on Count II, sexual misconduct with a minor as a Class B felony to support that conviction. Specifically, Stewart contends that K.H.'s testimony that Stewart licked her "vaginal area" does not prove the essential element of deviate sexual conduct. The well-established standard of review to a challenge of the sufficiency of the evidence to support a conviction requires us to "neither reweigh the evidence nor judge the credibility of the witnesses." Prickett v. State, 856 N.E.2d 1203, 1206 (Ind. 2006). We will affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id.

Indiana Code Section 35-41-1-9 defines deviate sexual conduct as "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Stewart concedes that K.H. testified that he licked her "vaginal area" after she was fourteen years old, but he argues that such testimony was not specific enough to describe her sex organ.

Appellant's Brief at 12-13. We have rejected this argument in the past stating that "it defies common sense that the legislature intended to criminalize the oral stimulation of the vagina without also criminalizing the oral stimulation of the vaginal area." Bear v. State, 772 N.E.2d 413, 425 (Ind. Ct. App. 2002). Stewart does not challenge or otherwise attempt to distinguish that caselaw on appeal. Thus, the evidence sufficiently supports Stewart's conviction for sexual misconduct with a minor.

Issue Three: Sentencing

A. Imposition of Presumptive Sentences

Stewart first argues that the trial court erred by imposing the presumptive[3] sentences because they were the maximum permissible sentences under Blakely. In other words, he contends that after Blakely a trial court may not impose the presumptive sentence without the existence of valid Blakely aggravators. Appellant's Brief at 14. The presumptive sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1801 (Ind. 2006). When a trial court imposes the statutory presumptive sentence, it is not required to list aggravating or mitigating factors. Id. Furthermore, our Supreme Court has held that Blakely only prohibits a trial court from finding an aggravating circumstance and enhancing a sentence beyond the statutory maximum. Davidson v. State, 849 N.E.2d 591, 594-95 (Ind. 2006).

Nevertheless, in this case, the trial court identified one aggravating circumstance and three mitigating circumstances and found them to be balanced. Stewart challenges

[3] Although the trial court mistakenly used the word "advisory" to describe Stewart's sentences, that inadvertent error is not at issue here.

the validity of the trial court's identified aggravator: that Stewart was in a position of trust with each of his victims, specifically K.D. Appellant's Brief at 14. This aggravator – the defendant violated his position of trust with the victim – is frequently cited by sentencing courts where an adult has committed a crime against a child.

The "position of trust" aggravator generally applies when the defendant has a relationship with the victim and exploits that relationship to commit the crime. See, e.g., Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). Our Supreme Court has held that the fact that a defendant was the victim's day care provider supported the "position of trust" aggravator. Trusley v. State, 829 N.E.2d 923, 926-27 (Ind. 2005). We have approved consideration of this aggravator where a child molest victim spent the night at the defendant's home as a guest of his daughter. Hines v. State, 856 N.E.2d 1275, 1280-81 (Ind. Ct. App. 2006), trans. pending; see also Krumm v. State, 793 N.E.2d 1170 (Ind. Ct. App. 2003) (position of trust aggravator validly applied to defendant's whose wife babysat the victim in their home).

The trial court specifically found that H.V. and K.H. viewed Stewart as their grandfather. It also found that K.D. was a guest in Stewart's home where he acted as a caretaker. Thus, the trial court appropriately considered facts about Stewart's offenses to conclude that Stewart violated his position of trust with all his victims. The trial court also found this aggravator to carry "very substantial weight" such that it balanced the identified mitigating factors. Transcript at 549. The trial court's imposition of the presumptive sentences is not error.

B. Consecutive Sentences

Stewart next claims that the trial court improperly ordered his sentences to run consecutive to one another. Initially, as both Stewart and the State correctly state, the imposition of consecutive sentences does not raise an issue under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004):

> The trial court's sentencing of Smylie to consecutive terms after finding an aggravating circumstance did not increase the sentence above the statutory maximum for each offense. There is no constitutional problem with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums.

Plummer, 851 N.E.2d at 390 (quoting Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005)).

A trial court may not, however, impose consecutive sentences unless it finds at least one aggravating circumstance. Id. "[T]he only possible question regarding the propriety of the consecutive sentences is whether or not there were sufficient aggravating circumstances to support the decision to run the sentences consecutively." Id. (quoting Bryant v. State, 841 N.E.2d 1154, 1157 (Ind. 2006)). When a trial court imposes consecutive sentences not statutorily required, it must explain its reasons for selecting the sentence imposed, including: 1) the identification of all significant aggravating and mitigating circumstances; 2) the specific facts and reasons that lead the court to find the existence of each such circumstance; and 3) an articulation demonstrating the balance of mitigating and aggravating circumstances to determine the sentence. Id.

The trial court ordered Stewart to serve his sentences consecutively after finding the following aggravators: the crimes were "part of a pattern and series of molestations" in that they were committed at different times, against three different victims, and over a

lengthy time period; Stewart committed some of the crimes in the presence of minors; and he used his wife's family to gain access to the victims. Transcript at 554. Although the trial court found three mitigators to determine the length of each sentence, it neither reiterated those mitigators nor found any other mitigators relative to the imposition of consecutive sentences in its oral or written statements.

The trial court, however, found additional aggravating factors beyond the earlier identified "position of trust" aggravator. In Gleaves v. State, 859 N.E.2d 766 (Ind. Ct. App. 2007), the trial court found the aggravating and mitigating circumstances to be balanced when it imposed the presumptive sentences for Gleaves' convictions for voluntary manslaughter and attempted aggravated battery. Id. at 771. The trial court then determined that because Gleaves committed "separate and distinct acts at separate times" against two different victims, his sentences should be imposed consecutively. Id. On appeal, Gleaves argued that the trial court was required to impose concurrent terms after finding the aggravators and mitigators in balance. See Marcum v. State, 859 N.E.2d 766 (Ind. 2000) ("[B]ecause the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms."). Stewart cites Marcum in support of the same argument.

In Gleaves, we affirmed the imposition of consecutive sentences because the trial court's comments constituted "the finding of an additional aggravating circumstance, i.e., multiple victims, over and above the ones already identified by the trial court in its previous comments." Gleaves, 859 N.E.2d at 771. In other words, because the trial court found the aggravators and mitigators in equipoise without the additional aggravator, we

concluded that the inclusion of another aggravator tipped the balance in favor of the aggravators to justify the imposition of consecutive sentences. Id.

In this case, the trial court initially identified one aggravator, Stewart's position of trust, and three mitigators, lack of criminal history, strong support group, and undue hardship to his dependents from long-term incarceration. The trial court found those circumstances to be balanced and imposed the presumptive sentence on all convictions. But the trial court was not finished. As it recounted in its sentencing statement:

> In this case, I do find that there are circumstances supporting the finding that Defendant should serve the above sentences consecutively [sic] to each other. The crimes were committed at different times on different dates and with three (3) different victims. These were not isolated events. The crimes were committed over a long period of time. These events were part of a pattern and series of molestations. The Defendant committed some of the events in the presence of other children under age eighteen (18). I also find in support of the consecutive sentences, Defendant abused the trust of his wife's family members in order to allow the girls to stay at Defendant's house and so he could have access to the victims.

Transcript at 553-54. "[I]t is an exercise in simple logic to conclude that the aggravating circumstances preponderate with the addition" of these factors. Gleaves, 859 N.E.2d at 771. Indeed, the trial court's articulation of the "multiple victims" aggravating circumstance standing alone supports the imposition of consecutive sentences. "[E]nhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Perry v. State, 845 N.E.2d 1093, 1097 (Ind. Ct. App. 2006) (quoting Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003)). The trial court, however, identified at least two other valid aggravators beyond that: the commission of Stewart's crimes in the presence of other minors and his exploitation of his family to gain access to his victims.

The trial court considered and balanced the aggravating and mitigating circumstances as evidenced by its statements. Even though the trial court did not specifically state that the aggravators outweighed the mitigators for purposes of ordering Stewart's sentence to be served consecutively, the record indicates that the court engaged in an evaluative process and deemed presumptive, consecutive sentences appropriate. Plummer, 851 N.E.2d at 392. Thus, the trial court did not abuse its discretion when it sentenced Stewart.

Issue Four: Whether Sentence is Inappropriate in Light of Offenses and Character

Stewart argues that, although his crimes are serious, his sentence is inappropriate because he never used force or weapons and he did not injure his victims. Under Indiana Appellate Rule 7(B) we may revise a sentence authorized by statute if, after considering the trial court's decision, we find that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender. In this review, however, we recognize the special expertise of the trial court in making sentencing decisions and do not merely substitute our opinion for that of the trial court. Davis v. State, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006).

Stewart also recites additional facts regarding his character to support a reduced sentence, including that he donated time and money to his church, he was well-mannered and considerate, and his mother depended on him emotionally and financially. It is clear, however, that the trial court took such facts into consideration when it identified the three mitigators: his lack of criminal history; his active support group; and the fact that long-term incarceration would cause a hardship on Stewart's son, wife, and mother. These

mitigators offset the trial court's valid aggravator to result in the imposition of the presumptive sentence for each of Stewart's offenses. In other words, the trial court credited Stewart for the positive aspects of his character.

The trial court also considered the nature of Stewart's offenses, the multiple molestations of three different young girls, including his two granddaughters, over a period of at least three years and–at least twice–in the presence of another minor, and found the nature of his offenses to be an aggravating circumstance supporting the imposition of consecutive sentences. We cannot say that Stewart's aggregate fifty-two-year sentence for five separate sexual crimes against children is inappropriate in light of the nature of his offenses and what they reveal about his character.

Affirmed.

RILEY, J., and BARNES, J., concur.